Toffoloni v. LFP Publishing Group, LLC Doc. 53

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NORTHERN DIVISION

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z,

Defendants.

Case No. 1:08-cv-00421-TWT

JOINT PRELIMINARY REPORT AND DISCOVERY PLAN

1. Description of Case:

(a) Describe briefly the nature of this action.

Plaintiff brings a tort claim under the Georgia common law right of publicity.

(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.

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Plaintiff Toffoloni is the mother and Administrator the Estate of the late Nancy Benoit. In June, 2007, Ms. Benoit, a well-known professional wrestler, and her son (Plaintiff's grandson) were murdered by Ms. Benoit's husband, the well-known professional wrestler Chris Benoit, who then committed suicide. Some 20 years prior to her death, Ms. Benoit voluntarily posed for a number of nude and seminude photographs, as well as a videotape, by Mark Samansky, a professional photographer. Plaintiff alleges that Ms. Benoit directed Samanksy to destroy the photographs, and that he led her to believe he had done so. After the Benoit murder-suicide became national news, Samansky extracted photographs from the video, and conveyed the right to publish the copyrighted images to LFP for publication in *Hustler* Magazine. The photographs of Benoit were published with an article on Ms. Benoit's life and death in the March 2008 issue of *Hustler* Magazine.

(c) The legal issues to be tried are as follows:

LFP contends that the issues to be tried include whether Plaintiff has standing to bring a claim for right of publicity on behalf of Ms. Benoit's estate; whether there has been a commercial misappropriation of the likeness of Ms. Benoit, to the benefit of LFP; if so, the measure of damages for such misappropriation, including Plaintiff's request for punitive damages; and whether Plaintiff's claim is barred by the First Amendment to the U.S. Constitution.

Toffoloni contends that because of the opinion and judgment of the 11th Circuit Court of Appeals in this case, the only issues to be tried are Plaintiff's actual damages arising from Defendant's violation of her decedent's right of publicity; and Plaintiff's claims for punitive damages and attorney fees under Georgia law. Toffoloni contends that the Defendant's liability for the intentional tort of violation of publicity under Georgia law has already been established by the Court of Appeals.

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases: None.

(2) Previously Adjudicated Related Cases: None.

2. The case is complex because it possesses one (1) more or more of the features listed below (please check):

None.

______ (1) Unusually large number of parties
______ (2) Unusually large number of claims or defenses
______ (3) Factual issues are exceptionally complex
______ (4) Greater than normal volume of evidence
______ (5) Extended discovery period is needed
______ (6) Problems locating or preserving evidence
______ (7) Pending parallel investigations or actions by government
______ (8) Multiple use of experts
______ (9) Need for discovery outside United States boundaries
______ (10) Existence of highly technical issues and proof

3. Counsel.

The following individually-named attorneys are hereby designated as lead counsel for the parties.

Plaintiff: Richard P. Decker

Defendant: James C. Rawls

4. Jurisdiction:

Is there any question regarding this court's jurisdiction?

____ Yes _X_ No

If "yes," attach a statement, not to exceed one (1) page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

5. Parties to This Action:

(a) The following persons are necessary parties who have not been joined:

Plaintiff expects to learn through discovery the identity of additional entities to which Defendant LFP licensed publication of the subject photos, and will move to amend her complaint to add party-defendants as necessary and appropriate.

(b) The following persons are improperly joined as parties:

None.

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted.

None.

(d) The parties shall have a continuing duty to inform the court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed.R.Civ.P. 15. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings which the parties anticipate will be necessary:

As noted in response to Section 5(a), supra, Plaintiff anticipates that it will be necessary to amend her complaint to add party-defendants should entities licensed by Defendant LFP to publish the subject photos be identified.

(b) Amendments to the pleadings submitted LATER THAN THIRTY (30 DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times for Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY (30) DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the Court to file later. Local Rule 7.1A(2).

(a) Motions to Compel: before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) Summary Judgment Motions: within twenty (20) days after the close of discovery, unless otherwise permitted by court order. Local Rule 56.1.

(c) Other Limited Motions: Refer to Local Rules 7.2, 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) Motions Objections to Expert Testimony: Daubert motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection.

None.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

None.

10. Discovery Period:

The discovery period commences thirty (30) days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.

Cases in this court are assigned to one of the following three (3) discovery tracks: (a) zero (0)-months discovery period, (b) four (4)-months discovery period, and (c) eight (8)-months discovery period. A chart showing he assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

Please state below the subjects on which discovery may be needed:

1. Ms. Benoit's employment history; business and professional contracts, including employment, licensing, sponsorship, endorsement and other agreements; income and revenue and activities generating same; tax records; and exploitation of her image and likeness, including modeling, acting, endorsement and/or other professional or amateur entertainment portfolios.

2. The circumstances of the Samansky photo shoot.

3. Toffoloni contends that the subjects outlined by Defendant in Paragraphs 1 and 2 above are now irrelevant, immaterial and moot. Plaintiff has filed a motion for Partial Summary Judgment in this regard so as to avoid the unnecessary time and expense of discovery on issues already resolved by the Court of Appeals. Toffoloni contends that the subjects on which discovery is needed are as follows: Defendant's income and revenues from all sources as the result of its use of the images of Nancy Benoit without permission; the amount of money paid by Defendant to Mark Samansky for the images; and the income and net worth of Defendant LFP and all related and parent companies for purposes of Plaintiff's claim for punitive damages..

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:

The parties suggest a four-month fact discovery track with expert reports (if any) being completed and served within the four-month period, and the respective experts being produced for depositions and their depositions completed within thirty days after the expiration of the four-month period.

11. Discovery Limitation:

What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed?

None.

12. Other Orders:

What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?

The parties agree that an umbrella confidentiality protective order governing the production of commercially-sensitive financial information is warranted and appropriate. The parties are presently working to prepare jointly a mutually-agreeable protective order and anticipate soon submitting a proposed Order to the Court.

13. Settlement Potential:

(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on October 12, 2009, and that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.

For plaintiff:

Lead counsel (signature): ____________________________
Richard P. Decker

Other participants: F. Edwin Hallman, Jr., Esq.

For defendants:

Lead counsel (signature) ____________________________
James C. Rawls

Other participants: S. Derek Bauer, Esq.

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears there is now:

______ A possibility of settlement before discovery.

______ A possibility of settlement after discovery.

______ A possibility of settlement, but a conference with the judge is needed.

___X__ No possibility of settlement

(c) Counsel (__) do or (_X_) do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is June 30, 2009.

(d) The following specific problems have created a hindrance to settlement of this case:

Defendant LFP contends that the Eleventh Circuit opinion reinstating Plaintiff's Complaint is in error and intends to seek certiorari to the U.S. Supreme

Court, and will not consider making an settlement until the appeal effort is fully and finally resolved.

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

(a) The parties ( ) do consent to having this case tried before a magistrate judge of this court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of court this ______ day of ____________________, 20__.

(b) The parties (_X_) do not consent to having this case tried before a magistrate judge of this court.

Richard Decker (by SDB w/ permission)

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Upon review of the information contained in the Joint Preliminary Report and Discovery Plan form completed and filed by the parties, the court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as set out in the Federal Rules of Civil Procedure and the Local Rules of this Court, except as herein modified.

IT IS SO ORDERED, this ____ day of _________________, 2009.

____
Thomas W. Thrash
Judge, United States District Court
for the Northern District of Georgia

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